No. 16536

In the

United States Court of Appeals

For the Ninth Circuit

United States Fidelity and Guaranty Company, a Corporation,
Appellant,

vs.

Roscoe B. Smith and Ida Smith, Ronald G. Callahan, Harold L. Smith, Ruth Smith and Ronald M. Smith,
Appellees.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

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JURISDICTION

The jurisdiction of the District Court was invoked under Act June 25, 1948, c. 646, 62 Stat. 930; 28 U.S.C.A. § 1332. Appellant United States Fidelity and Guaranty Company, a Maryland corporation, commenced this action, alleging that Appellee-defendants Roscoe B. Smith, Ida Smith, Harold L. Smith, Ruth M. Smith and Ronald M. Smith are citizens and residents of the State of Arizona, that Appellee-defendant Ronald G. Callahan is a citizen and resident of the State of California, and that the amount in controversy

exceeds the sum of $3,000.00, exclusive of interest and costs.[1]

The jurisdictional allegations were admitted by Appellees[2] and confirmed by the Findings of Fact of the District Court.[3] Final judgment of the District Court was entered on April 23, 1959.[4] Appellant's Notice of Appeal was filed on May 19, 1959.[5] The jurisdiction of this Court is invoked under Act June 25, 1948, c. 646, 62 Stat. 929; as amended October 31, 1951, c. 655, § 48, 65 Stat. 726; and as amended July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Appellant commenced this action to obtain a judgment declaring that Appellee Ronald G. Callahan was not insured by Appellant at the time and place of an accident which occurred on March 28, 1957.[6] The District Court concluded that Callahan was insured and entered judgment in favor of Appellees.

The issue presented is whether the actual use of the insured automobile by Appellee Ronald G. Callahan at the time and place of the accident was with the permission of Appellee Roscoe B. Smith, the insured-owner. The questions presented are:

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1. Tr. 3-4. References to the printed Transcript of Record are designated as "Tr.".

2. Tr. 9, 11.

3. Tr. 25-26. The District Court found that the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. Tr. 28-29.

5. Tr. 30.

6. The complaint alleged an actual controversy between the parties. (Tr. 7) Declaratory judgment was authorized by Act June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349; 28 U.S.C.A. § 2201.

1. Whether permission can be found where the insured-owner and his bailee both concede there was no permission.

2. Whether permission can be found where the bailee uses the insured automobile at a time, at a place and for a purpose completely beyond the scope of the use contemplated by bailor and bailee when the bailment was made.

STATEMENT OF FACTS

For convenience and clarity, Appellees will sometimes be referred to by name.

Roscoe B. Smith and Ida Smith, his wife, own and operate a laundry and dry cleaning business in Phoenix, Arizona known as Swan Cleaners.[7] On March 8, 1957 Appellant issued an insurance policy to "R. B. Smith, dba Swan Cleaners", effective until March 8, 1958.[8] One of the automobiles insured under the policy was a Willys Station Wagon (hereinafter called the "Jeep") owned by R. B. Smith.[9] The insurance policy contained an omnibus clause whereby the bodily injury and property damage liability insurance therein provided was made to extend not only to the named insured, but to:

> "* * * any person while using an owned automobile * * * provided the actual use of the automobile is by the Named Insured or with his permission * * *."[10]

In January, 1957 Ronald Callahan, 17 years of age, came to Phoenix from his home in California to work for R. B. Smith, his grandfather.[11] He was employed as a pickup and

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7. Tr. 36.
8. Plaintiff's Exhibit 1; Tr. 5, 66, 76.
9. Tr. 5, 82.
10. Tr. 66.
11. Tr. 36-37, 84, 86.

delivery boy. In the course of his pickup and delivery duties, Callahan was permitted to, and did, use the insured Jeep.[12]

For the first two or three weeks Callahan lived with his grandfather. He then went to live with Harold L. Smith and Ruth M. Smith, his uncle and aunt, and Ronald Michael Smith (hereinafter called "Michael"), his cousin. Harold Smith, R. B. Smith's son, was at first employed in his father's plant, and Callahan rode to and from work with him. Later, Harold Smith took over one of his father's agencies away from the plant.[13] At that time R. B. Smith told Callahan to take the Jeep at night for the purpose of having transportation to and from work. They had no other conversation in regard to the use of the Jeep.[14] It was understood by both parties, however, that Callahan could use the Jeep to run errands to the grocery store and drug store, but he was not to use the Jeep for joy riding.[15]

On one occasion prior to the accident, Harold Smith told R. B. Smith that Callahan had used the Jeep at night for personal purposes. R. B. then told Harold to see to it that before Callahan took the Jeep in the evening to run around, Callahan was to first get Harold's permission.[16] Again, Callahan understood this restriction on his use of the truck for personal reasons.[17]

At about 2:00 o'clock on the morning of March 28, 1957, while Harold and Ruth Smith were sleeping, Callahan and his cousin Michael took the Jeep, left Phoenix and proceeded toward Superior, Arizona. Some four and a half hours later, at approximately 6:30 o'clock that morning, at

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12. Tr. 37, 89, 91.
13. Tr. 92-93.
14. Tr. 39, 42, 92-94.
15. Tr. 47-48, 94.
16. Tr. 47-48, 50.
17. Tr. 94, 105.

a place about 2¼ miles east of Mesa, Arizona (18 miles from Phoenix), Callahan fell asleep at the wheel, the Jeep left the highway and overturned, and both boys were injured.[18] Shortly after the accident Callahan told the investigating Arizona Highway Patrolman that:[19]

> "* * * he was the driver of the vehicle, and that they were running away from home, and that he had went east of Mesa some distance out towards Superior and turned around, and was starting back, and that he was very much scared because he had taken the car without permission of his grandfather."

In his deposition, received in evidence, Callahan testified that Michael Smith was going to run away from home, so Callahan decided to drive Michael around until morning when Michael's father, Harold Smith, could be consulted.[20] Why Callahan didn't simply awaken Harold is unexplained. In any event, Callahan told no one he was going and did not obtain permission to leave from either Harold or R. B. Smith.[21]

R. B. Smith and Callahan both admit that Callahan had no permission to use the Jeep at the time and place of the accident. Their exact testimony in this regard is as follows:

R. B. Smith:[22]

> "Q. (By Mr. Kaplan): Mr. Smith, let me ask you this: At the time of the accident in question, was Callahan authorized to use your Jeep truck?
>
> A. Not that trip.
>
> Q. And he had no permission to use it at that time?
>
> A. No.
>
> * * * * * * *

18. Tr. 44, 54-55, 62-63, 98-100.
19. Tr. 57.
20. 98-100.
21. Tr. 62-63.
22. Tr. 45-46.

Q. (By Mr. Kaplan): Mr. Smith, did Mr. Callahan at the time of this accident have any occasion whatsoever to be in that area at that time, as part of his work for you?

A. No, sir."

Ronald Callahan:[23]

"Q. You were not, at the time you took the Jeep or at the time you were doing all this riding around prior to the accident, on any business for your grandfather, were you?

A. No. None.

Q. You knew when you took the Jeep that you were driving it around without your grandfather's or your uncle's permission?

A. Yes, that night I did.

Q. That night. You knew that you were not supposed to use the Jeep for that purpose?

A. Yes; for that purpose; just to ride around in.

* * * * * * *

Q. I mean, you knew that before taking the Jeep truck with Mike and going out that evening, riding around, going over to Mesa the way you did, that before doing that you were either supposed to have your grandfather's permission or your uncle's permission?

A. Yes.

Q. And then you knew that you were using the Jeep at that time totally without permission?

A. Yes, sir. I did."

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making Finding of Fact No. 5[24] that:

"The described policy of insurance afforded liability insurance coverage to the named insureds and, in addi-

23. 100-101, 105.

24. Tr. 26.

> tion thereto, to any person using the insured vehicle with the permission of the insureds."

for the reason that such finding is contrary to the language of the policy that the liability coverage is extended to "any person while using an owned automobile * * * provided the actual use of the automobile is by the Named Insured or with his permission."

2. In making the following portion of Finding of Fact No. 6:[25]

> "On March 28, 1957, the defendant Ronald G. Callahan was driving the insured automobile with the permission of the insureds * * *."

for the reason that the conclusion is not sustained by the facts, which are uncontradicted, and is contrary to law in that there is no "permission", within the meaning of the omnibus clause of the insurance policy, where the use made of the insured automobile at the time and place of the accident deviates materially from the time, place and purpose for which such use was permitted.

3. In making that portion of Conclusion of Law No. 2,[26] and entering that portion of the judgment appealed from, as follows:

> "At the time of the accident * * * the policy of insurance * * * extended coverage to * * * Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident."

for the reason that the facts do not justify such conclusion and judgment, and they are contrary to law.

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25. Tr. 26.
26. Tr. 27, 29.

SUMMARY OF ARGUMENT

The omnibus clause extends liability insurance to any person using an insured automobile provided the actual use thereof is with the permission of the named insured; such persons become additional insureds under the policy.

The courts have expressed divergent views on whether the omnibus clause extends to a person whose use of the insured automobile at the time of the accident is outside the scope of the purpose for which permission was granted in the first instance.

Some courts have adopted the minority rule, or so-called "liberal rule", that when the person receives permission to use the car in the first instance, any use while it remains in his possession is with permission under the omnibus clause, even though he deviates from the use contemplated by the parties when the insured-owner parted with possession. *Dickinson v. Maryland Casualty Co.,* 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); *Stovall v. New York Indem. Co.,* 157 Tenn. 301, 8 S.W. 2d 473, 72 A.L.R. 1368 (1928).

The majority of courts, this Court included, have adopted the minor deviation rule: There is no permission within the meaning of the omnibus clause unless the car is used at a time or place, or for a purpose, contemplated when permission was originally given, or such a minor deviation from the contemplated use as to be immaterial. *Fredericksen v. Employers' Liability Assur. Corp.,* 26 F.2d 76 (C.C.A. 9 Cal., 1928); *Trotter v. Union Indem. Co.,* 35 F.2d 104 (C.C.A. 9 Wash., 1929); *Hodges v. Ocean Acc. & G. Corp.,* 66 Ga. App. 431, 18 S.E. 2d 28 (1941), cert. den. 62 S. Ct. 1299, 316 U.S. 693, 86 L. Ed. 1763 (1942), reh. den. 63 S. Ct. 25, 317 U.S. 705, 87 L. Ed. 563 (1942); *Gulla v. Reynolds,* 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

The majority rule is the better-reasoned rule and the one most likely to be adopted in Arizona.

Under the majority rule, when a person is given permission to use a car to work, to go back and forth to work and to run errands, and he is involved in an accident at 6:30 in the morning, at a place some 18 miles distant from the city of intended use, and while using the car for the purpose of running away from home or joy riding, he is not an additional insured under the omnibus clause. Such use is a radical deviation from the use contemplated when permission was granted and cannot be held to be with the permission of the insured-owner.

ARGUMENT

I. The Omnibus Clause Extends Only to Persons Using the Automobile Within the Scope of the Permission Granted.

The omnibus clause extends liability insurance to persons who come within its terms and meet its requirements. Such persons become additional insureds, as if they were named in the policy.[27]

It is clear that the omnibus clause does not extend coverage to every person using the insured's automobile. One condition especially stipulated by the omnibus clause is that the actual use of the automobile is with the permission of the named insured.

The instant case is a novel one in that there are no Arizona decisions involving the omnibus clause. Other courts have interpreted the clause in various ways. The decision in this case may very well shape the law of Arizona on this subject.

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27. General discussions as to the effect of an omnibus clause are found in *Appleman, Insurance Law and Practice*, Vol. 7, Sec. 4353, p. 127; 5A *Am. Jur., Automobile Insurance*, Sec. 91, pp. 89-90; 45 *C.J.S., Insurance*, Sec. 829, pp. 894-895.

It is well-settled that the permission required may be express or implied.[28] Many cases turn on the question of whether there was permission, express or implied, to use the car in the first instance, that is, to use the car at all. That question is not involved here. There is no question in this case that R. B. Smith gave Ronald Callahan, his employee-grandson, permission to use the Jeep. The question is whether Callahan was using the Jeep at the time of the accident within the scope of the permission granted. It is on this question that the courts are divided.

A. The Minority Rule.

Some courts take the view that when the bailee receives express or implied permission to use the car in the first instance, any use while it remains in his possession is with permission under the omnibus clause, even though he deviates from the use contemplated by the parties when the bailor parted with possession. More succintly stated, permission for any purpose implies permission for all purposes. This rule is sometimes called the minority rule, sometimes the liberal rule.[29] One distinguished authority has critically dubbed it the "hell or high water" rule.[30]

The leading cases supporting this rule are *Dickinson v. Maryland Casualty Co.,* 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924), and *Stovall v. New York Indem. Co.,* 157 Tenn. 301, 8 S.W. 2d 473, 72 A.L.R. 1368 (1928).[31]

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28. 5A *Am. Jur., Automobile Insurance,* Sec. 94, p. 92; *Anno.:* 5 A.L.R. 2d 608, 45 *C.J.S., Insurance,* Sec. 829, pp. 896-898.

29. *Aetna Casualty & Sur. Co. v. DeMaison,* 213 F.2d 826 (C.A. 3 Pa., 1954); *Anno.:* 5 A.L.R. 2d 622.

30. *Appleman, Insurance Law and Practice,* Vol. 7, Sec. 4366, p. 169.

31. Other states said to be in accord with this rule are Illinois, Louisiana, Massachusetts, New Jersey, Oregon and Wisconsin. *Anno.:* 5 A.L.R. 2d 624, 629.

In *Dickinson* the bailee received permission to use the car for the purpose of going home and changing his clothes, with the admonition to hurry back. Instead, the bailee went to a saloon, picked up three passengers, proceeded more than a mile directly away from his home to another drinking place, and then to a third place. Thinking it might be time to return the car, the bailee started back toward the owner's garage, intending to find out on the way if he still had time to change clothes. While on the way back, the car skidded into a tree and one of the passengers was killed. There is some doubt that *Dickinson* is authority for the minority rule. Much of the language in the opinion supports that rule. The actual holding, however, was that:

> "* * * These slight deviations from the route to his home, in a swiftly moving automobile, are too unimportant to have attached to them by construction the import of annulling the protective features of this insurance policy." 125 A. 870.

Stovall leaves no doubt. In that case the insured's employee was permitted to use the car in his business as the insured's salesman. He was specifically admonished not to use the car for his own pleasure or private purposes. On one occasion he received permission to take the car from its garage for the purpose of taking some customers to the railroad station. Thereafter the car was returned to the garage. Instead of giving the claim check to his superior, as he was supposed to, the employee kept the check and later took the car from the garage a second time. This time he proceeded to visit his fiancee' in a city many miles away. While on the way, he was involved in an accident. The Court expressly held (8 S.W. 2d 477):

> "It is our opinion that the words, 'providing such use or operation is with the permission of the named assured,' were intended to exclude from the protection

> of the policy a person who should take the automobile and use it without permission or authority in the first instance. If, however, the automobile covered by the policy is delivered to another for use, with the permission of the owner or insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession."

The rationale of this rule is that liability insurance is for the benefit of the public as well as for the named or additional insured, and the object of the omnibus clause is to cover the liability of any operator to whom the named insured has voluntarily given possession of the car. In many cases this rationale is based upon the various statutes adopted by several states requiring owners of automobiles to carry liability insurance, the reasoning being that the legislative intent was to protect those injured by an automobile, no matter when, where or for what purpose it is driven, so long as the driver was given possession of the car for some purpose. There is no such statute in Arizona.

The minority rule can be absurd in its application. For example, it would extend coverage where the owner permits a friend to use his car for a local errand, and the friend absconds to another state intending to keep the car. The friend would at once be liable to the owner for conversion and held to have the owner's permission to use the automobile. This is an unreasonable extension of the meaning of "permission" as used in the omnibus clause. In recognition of the lack of sound reasoning behind the minority rule, Tennessee has now rejected the *Stovall* case. *Branch v. United States Fidelity and Guaranty Company,* 198 F.2d 1007 (C.A. 6 Tenn., 1952).

B. The Majority Rule.

The majority of the courts, this Court included, have rejected the rationale of the so-called liberal rule and have adopted what is known as the minor deviation rule. Under this rule express permission for a given purpose does not imply permission for all purposes. To be within the omnibus clause, the bailee must use the car at a time or place, or for a purpose, contemplated by the parties, or his use must be such a slight or minor deviation therefrom as to be immaterial.

The leading cases supporting this rule are *Fredericksen v. Employers' Liability Assur. Corp.,* 26 F.2d 76 (C.C.A. 9 Cal., 1928); *Trotter v. Union Indem. Co.,* 35 F.2d 104 (C.C.A. 9 Wash., 1929); *Hodges v. Ocean Acc. & G. Corp.,* 66 Ga. App. 431, 18 S.E. 2d 28 (1941), cert. den. 62 S. Ct. 1299, 316 U.S. 693, 86 L. Ed. 1763 (1942), reh. den. 63 S. Ct. 25, 317 U.S. 705, 87 L. Ed. 563 (1942); and *Gulla v. Reynolds,* 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

In *Fredericksen* the insured gave a friend permission to use his automobile for the purpose of attending an early morning funeral in Oakland. After the funeral was over, the friend and some of his companions drove around Oakland until noon and then decided to drive to Livermore, 40 miles away. The friend attempted by telephone to obtain the insured's permission, but could not reach the insured. About midway on the return trip from Livermore, at approximately 6 o'clock in the evening, the friend was involved in an accident. This Court said (26 F.2d 77):

> "It may be conceded that slight deviations by one who has been permitted by the insured to use an automobile for a specified purpose does not destroy the insurer's liability for injuries to the driver or his guests, but that is far from saying that the permission to use an automobile to attend a funeral in the morning

> in the city in which the insured resides carries with it permission to use the automobile in the afternoon for a joy ride many miles beyond the city limits."

In *Trotter* the insured furnished his car to one Hickey for use in making sales, upon commission, of certain lots near Seattle belonging to the insured. The insured also consented to use of the car by Hickey's assistants and employees in the sale of the lots, and to use of the car for pleasure by members of Hickey's family. One evening Hickey and a person named Bullock engaged in conversation regarding the possibility of the latter's employment to sell the lots, but no agreement was reached. While so engaged, they drank some liquor, and when they parted, late at night, Hickey authorized Bullock to take the insured's car and use it for Bullock's pleasure. This Court said (35 F.2d 105-106):

> "If we interpret these findings in the light of the court's memorandum opinion [33 F.(2d) 363] filed at the same time, the most that can be said for appellant is that restrictions upon the use of the car were not expressed by the owner when he gave Hickey possession thereof. But, admittedly, the only object Grill had was to aid Hickey in carrying to success the business enterprise in which they were both interested. Hence a restriction to that purpose, in the absence of evidence to the contrary, is clearly implied. It might not be unreasonable to say that the owner contemplated that while the enterprise was in progress Hickey and members of his immediate family would now and then use the car for pleasure, but as suggested by the court below, to hold, in the absence of any affirmative expression of consent, that Grill contemplated or intended that Hickey would permit use by more or less intoxicated joy riders on the streets of Seattle at 4 o'clock in the morning would be against reason. Nor do we share in the view that express 'permission' for a given purpose implies permission for all purposes. * * *"

This Court expressly rejected the minority rule as stated in *Stovall v. New York Indem. Co.*, supra, 8 S.W. 2d 473.

In *Hodges* the Seaboard Loan & Savings Company furnished an automobile to C. F. Langran, its employee, for use in the company's business. Langran was also advised that he could keep the car after business hours to go back and forth to work. On a Sunday afternoon Langran took the car and used it on a personal mission, during the course of which an accident occurred. The Georgia court said (18 S.E. 2d 32):

> "* * * we hold that while slight and inconsequential deviations will not annul the coverage of the omnibus clause, yet there is an absence of 'permission,' within the meaning of the policy, if the car is being driven at a time or place or for a purpose not authorized by the insured. In other words, the decisions of the courts, in states where no statutory regulations exist requiring liability insurance, are to the effect that permission means a consent to use the car at the time or place or for a purpose authorized by the insured, express or implied. This third element requires that the purpose for which the car is used at the time of the accident be a purpose stated or intended at the time that the bailment is made, but slight deviations are too unimportant to have attached to them by construction the import of annulling the protective features of the policy. * * *"

Gulla cites and relies upon the decisions of this Court in *Fredericksen* and *Trotter*. In *Gulla* the driver purchased a baby bed from the insured and asked permission to use the insured's truck to deliver the bed to a place a block away. Permission was granted; no instructions were given as to the use of the truck for any other purpose. Some three hours after permission was granted, beyond the area for contemplated use and beyond the scope of the purpose for which the driver was given permission, the truck and

driver were involved in an accident. The Ohio court said (81 N.E. 2d 408):

> "There are many decisions construing and applying permissive use provisions in liability insurance policies. These authorities divide into generally two doctrines. The so-called minority rule, *developed in construing the older policies, where the phraseology was 'use with permission,'* was that where permission, express or implied, was given by the owner to use the car in the first instance, such use was covered by the policy, even though the person using the car may have put it to a use far beyond that contemplated by the owner at the time permission to use was given. * * *
>
> * * * * * * *
>
> "The other, or majority doctrine, is that permission by the owner to the use of his car by another includes only such use as was reasonably contemplated by the owner, as shown by the circumstances, and that while, even under this doctrine, a slight deviation would not necessarily exclude coverage, yet a use by the operator outside the scope of the owner's contemplated permission excludes such use from being the permitted use within the terms of the policy.
>
> * * * * * * *
>
> "In more recent policies, and apparently to escape the so-called minority rule above referred to, the phraseology has been changed to 'actual use' with permission, etc. In Vol. 7, Appleman on Insurance Law and Practice, Casualty Insurance § 4354, page 132, it is stated: 'The term "actual use", as employed in the present policy, was drafted to confine the coverage to situations where the employment made of the vehicle at the time of the accident was within the scope of the permission granted.'
>
> "It seems logical to this court that the term 'actual use' be construed as referable to the use being made of the car *at the time and place of the accident* and if that be outside the reasonable scope of the permission

granted to hold that coverage is not extended to the driver. * * *" (Italics ours.)

The principles of the minor deviation rule may be summarized as follows:

1. When an insured gives another permission to use his car for specific purposes, restrictions to those purposes is clearly implied.

2. The term "actual use" in the omnibus clause refers to the use made of the automoible at the time and place of the accident, and if that be outside the reasonable scope of the permission granted, coverage does not extend to the driver.[32]

3. Permission means use of the automobile at a time or place, or for a purpose, contemplated when the bailment was made, or such a slight deviation therefrom as to be immaterial.

The minor deviation doctrine has been adopted by the majority of courts because it is the more reasonable rule, certainly the more logical.[33] It tenders a fair interpretation of the omnibus clause, an interpretation which accords with the language of the clause and is calculated to produce a

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32. In accord as to meaning of "actual use": *Laroche v. Farm Bureau Mutual Automobile Ins. Co.*, 335 Pa. 478, 7 A.2d 361 (1939); *Johnson v. Maryland Casualty Co.*, 34 F. Supp. 870 (D.C. Wisc., 1940); *Liberty Mutual Ins. Co. v. Stilson*, 34 F. Supp. 885 (D.C. Minn., 1940); *Hartford Acc. & Indem. Co. v. Peach*, 193 Va. 260, 68 S.E. 2d 520 (1952); *Aetna Casualty & Sur. Co. v. DeMaison*, supra footnote 29, 213 F.2d 826. This meaning, of course, is rejected by courts applying the minority rule. *Haeuser v. Aetna Casualty & S. Co.*, 187 So. 684 (La. App., 1939).

33. It has been stated that there is a third rule, known as the "strict" or "conversion" rule, under which no deviation, however slight, is permitted. *Appleman, Insurance Law and Practice*, Vol. 7, Secs. 4366, 4367, 4368, pp. 169, 172, 178; *Anno.:* 5 A.L.R. 2d 622 Analysis of the cases, however, reveals that the courts applying the so-called strict-rule are ready to overlook minor deviations from permitted use. Accord *Anno.:* 5 A.L.R. 2d 636-637.

just result. The Arizona courts are motivated by the same consideration, and it is therefore reasonable to assume that they would adopt the majority rule.

II. A Bailee Who Materially Deviates in Time, Place and Purpose from the Use Contemplated, and Who Admittedly Had No Permission, Is Not An Additional Insured Under the Omnibus Clause.

The District Court found that at the time of the accident Callahan was driving the Jeep with the permission of R. B. Smith. Manifestly, this finding is a legal inference or conclusion from the other facts proven, and it is therefore reviewable by this Court free of the clearly-erroneous rule.[34] *Aetna Casualty & Sur. Co. v. DeMaison,* 213 F.2d 826 (C.A. 3 Pa., 1954). An expression of the same principle by this Court, although not as to the same finding, is contained in *Stevenot v. Norberg,* 210 F.2d 615 (C.A. 9 Cal., 1954), as follows (at page 619):

> "* * * When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

The undisputed facts in this case are that Callahan was given permission to use the Jeep in his work and for transportation to and from work. He knew and understood that, except for errands to the grocery or drug store, he was not to use the Jeep in the evenings for joy riding or personal reasons without the express permission of his uncle or his grandfather. On March 28, 1957 at 2 o'clock in the morning, Callahan took the Jeep and left his uncle's home with his cousin Michael for the purpose either of running

34. Rule 52(a), Federal Rules of Civil Procedure.

away from home or just plain joy riding. He did not obtain permission from either his uncle or his grandfather. At about 6:30 that morning, after riding around for some four and a half hours, the accident occurred at a place approximately 18 miles from Phoenix.

Clearly, at the time of the accident Callahan was doing something radically different from that which he was authorized to do. His use of the Jeep to run away from home or joy ride for four hours, in the early morning, several miles from Phoenix, was a material deviation from the time, place and purpose contemplated by both R. B. Smith and Callahan when permission to use the Jeep was granted. Smith and Callahan both concede that at the time and place of the accident Callahan was using the Jeep without permission. As Callahan so aptly put it to the highway patrolman shortly after the accident, Callahan "was very much scared because he had taken the car without permission of his grandfather."

The only basis for the District Court's conclusion that Callahan had permission under the omnibus clause is that Callahan was given permission to use the Jeep in the first instance. Only the minority rule justifies a conclusion that permission existed in this case. As earlier pointed out, it is reasonable to assume that the Arizona courts would adopt the majority, minor deviation rule. Under the majority rule, the facts in this case demonstrate that at the time of the accident Callahan was not using the Jeep within the scope of the permission granted.

We have searched the cases carefully to find a decision involving the situation here presented. We were unable to find one. There are several cases, however, which involve similar situations and illustrate how the majority rule has been applied.

The *Fredericksen* and *Trotter* cases decided by this Court, and described supra, at pages 9, 13-15, are excellent examples.

In *Liberty Mutual Ins. Co. v. Stilson,* 34 F. Supp. 885 (D.C. Minn., 1940), C. W. Stilson was the owner of a Buick automobile and the father of Homer Stilson. Homer lived with his father and was permitted to drive the car in and about the city of Duluth, Minnesota, their home. One day Homer requested and received his father's permission to take the car to Minneapolis for a football game. Instead, Homer proceeded with some friends to Chicago and while en route, became involved in an accident. The Court held that there was no permission under the omnibus clause in C. W. Stilson's policy and said (34 F. Supp. 887):

> "The policy is to be construed in the light of the language it contains and I do not think there is any ambiguity in the language, 'provided further that the actual use is with the permission of the named insured'. This langauge limits the use of the automobile to a specific use permitted to be made of it at the time of the accident. If at that time permission is found to exist, coverage extends; otherwise not. * * *
>
> "* * * Express permission for a given purpose does not imply permission for all purposes."

In *Employers Casualty Co. v. Williamson,* 179 F.2d 11 (C.A. 10 Okla., 1950), one of the named insureds permitted ~~Kelly,~~ yarsaint an employee, to use an insured truck for the purpose of hauling dirt in the insureds' business. ~~Kelly~~ yarsaint was also permitted to use the truck to haul dirt for others, dividing the compensation between himself and the insureds. On one occasion ~~Kelly~~ yarsaint went to pick up a load of dirt at the home of a man named Weldon. Weldon was not home, so ~~Kelly~~ yarsaint started back to return the truck to the insureds' place of business. On the way he met a woman who asked him to haul dirt for her and also to obtain for her a second-hand

water heater. ~~Kelly~~ Yarsant agreed, the compensation to be split with the insureds. While on the way to the junk yard for the heater, ~~Kelly~~ Yarsant met with an accident. The District Court found permission under the omnibus clause of the insureds' policy. In reversing the District Court, the Court of Appeals said (179 F.2d 13-14):

> "Granting, for the sake of argument, that Yarsant's permission to use the truck was a general permission to haul dirt and that, therefore, his agreement to haul dirt for this woman was within the permissive use, this would not apply to his agreement to haul a water heater. Clearly, he had no permission to use the truck for such a purpose. If that were so, it would likewise give him the right to haul a stove, a refrigerator, furniture, or groceries. To so hold would convert a permit for a limited use into one for a general use.
> * * * * * * *
> "In order to find coverage here, the record would have to sustain a finding that Yarsant had permission to do any and all kinds of hauling. There is no evidence warranting such a finding. We think the undisputed evidence requires a finding that Yarsant had no permission to use the truck to haul the water heater and that, therefore, at the time of the accident he was not an insured person under the plain terms of the policy."

In *Aetna Casualty & Sur. Co. v. DeMaison,* supra, 213 F.2d 826, the insured permitted his automobile to be taken by his son for the purpose of going to a movie in Jenkintown, Pennsylvania. The son drove 3 miles beyond Jenkintown where he met some friends and then decided to go to a diner 3 or 4 miles more distant. The son permitted one of his friends to drive. After 2 or 3 miles, an accident occurred. The District Court found permission under the omnibus clause. The Court of Appeals held that it could draw its

own conclusion from the facts, reversed the District Court and stated these principles (213 F.2d 831):

> "* * * (1) 'there is no * * * liability if at the time of the accident the car is being driven at a time or place or for a purpose not authorized by the insured'; (2) permission by the insured owner to one to use his car may be express or implied; (3) the word 'permission' is to be construed as permission to use the car in a specified manner and for a specified purpose and where the policy provides ' "the *actual* use is with the permission of the Named Insured" ' the words 'actual use' are to be construed as ' "the particular use" '; (4) 'The "*use or operation* * * * with the permission of the named assured" *refers to the time of the casualty and not to the time of granting consent* * * *' and 'Where the owner allows another the use of his car for a specific purpose, *restriction to such purpose is clearly implied. Express permission for a given purpose does not imply permission for all purposes.*' " (Emphasis supplied.)

In *Fisher v. Firemen's Fund Indemnity Company,* 244 F. 2d 194 (C.A. 10 Kan., 1957), Rumpf, an employee of the named insured, on Christmas Eve, sought and received permission from the named insured to take the insured truck to Udall, Kansas on Christmas Day to have dinner with his parents. Rumpf resided, and the truck was normally garaged, in Wichita, Kansas, some 15 miles northwest of Udall. On Christmas Eve Rumpf became involved in an accident with the insured truck approximately 100 miles from Wichita on a route not going to or near Udall. Rumpf performed no service for the insured after leaving Wichita and was admittedly on a personal journey at the time of the accident. The District Court found that Rumpf was not using the truck with the insured's permission. In affirming, the Court of Appeals said (244 F.2d 196):

> "At the time of the collision giving rise to appellants' claims against Rumpf he had deviated in time, purpose, direction, and distance to such a degree from his express permissive use that it cannot be doubted that the actual use of the vehicle was not within the contemplation of the named insured. Persuaded as we are, absent a contrary Kansas ruling, that the minor deviation rule is properly applicable, it follows that the insurance company had no obligation to Rumpf under the omnibus feature of the insurance policy."

The District Court's Finding of Fact No. 5 reads as follows:

> "The described policy of insurance afforded liability insurance coverage to the named insureds and, in addition thereto, to any person using the insured vehicle *with the permission of the insureds.*" (Italics ours.)

By appropriate objection,[35] the District Court was requested to delete the italicized portion and to insert in lieu thereof an accurate paraphrase of the language of the policy: "provided the actual use thereof was with the permission of the named insureds." The failure of the District Court to change this finding demonstrates that it was not concerned with the precise language of the omnibus clause, but was basing its conclusion on the fact that Callahan had permission to use the Jeep in the first instance. In other words, the District Court applied the minority rule.

If the majority rule is applied, especially in the spirit of the authorities above cited, there can be no doubt that Callahan deviated grossly from the scope of his permission to use the Jeep. It cannot be said reasonably that when permission to use the Jeep was granted, it was contemplated that Callahan, a 17 year old employee-grand-

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35. Tr. 22-23.

son, would use the Jeep from 2 o'clock to 6:30 in the morning, at a place 18 miles from Phoenix, for the purpose of running away from home or joy riding. Callahan was not an additional insured under Appellant's policy by the majority rule.

CONCLUSION

Appellant respectfully submits that the District Court erred in finding that Callahan was using the Jeep at the time of the accident with the permission of R. B. Smith, because Callahan's use of the Jeep at the time of the accident was a material deviation from the time, place and purpose for which he originally received permission, and consequently, he was not an additional insured under Appellant's policy.

Appellant, therefore, prays that the judgment of the District Court be reversed, with instructions to enter judgment for Appellant.

Respectfully submitted,

MOORE & ROMLEY
By JARRIL F. KAPLAN
Attorneys for Appellant

(Appendix Follows)

Appendix

Plaintiff's Exhibit No.	Description	RECORD PAGE NO. Identified	Offered	Received
1	United States Fidelity and Guaranty Company Policy No. CLP 38913 issued to R. B. Smith dba Swan Cleaners	34	34	35
2	Deposition of Ronald G. Callahan	52	52	52